Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N-02-1-94
ZAKARIA YATIM, NH CHAN AND MAHADEV SHANKAR JJCA
7 MARCH 1995

Companies and Corporations *— Winding up — Stay of proceedings — Effect of winding-up order — Whether can be rescinded — Companies Act 1965 s 342(1)*

Civil Procedure *— Stay of proceedings — Companies winding up — Effect — Order for stay itself stayed — Whether court can still hear applications and make orders*

On 5 September 1989, Nadchatiram Realities (1960) Sdn Bhd was ordered to be compulsorily wound up by the High Court on a creditor's petition by the Inland Revenue Department. On 22 March 1994, the High Court allowed an application by four contributories of the company (which included the first and second respondents) to discharge the winding-up order and stay all proceedings in relation to the winding up ('the 22 March order'). The appellant's application to the then Supreme Court for an interim stay of the 22 March order was allowed and her appeal to the Federal Court is pending. Meanwhile, on 29 June 1994, the judge allowed an application by the first, second and third respondents to set aside an earlier order dated 24 January 1994 which had been obtained by the appellant and for other reliefs. Against this order of 29 June 1994, the appellant has now appealed to the Court of Appeal.The issue before the court was what the effect of a stay of proceedings on a winding-up order was.

Held, allowing the appeal and setting aside the order of 29 June 1994:

(1) A winding-up order cannot be discharged or rescinded after it had been made and the only remedy is to apply for a stay of proceedings under s 342(1) of the Companies Act 1965. The effect of an order to stay proceedings under the winding-up order is a total discontinuance or termination of the winding-up proceedings.

(2) Even though the 22 March order had itself been stayed by the then Supreme Court, it was still in existence although it was for the time being inoperative until the appeal was heard by the Federal Court. Because the 22 March order still existed, the judge ought not to have heard the application or made any order after that date in proceedings under the winding-up order. An affirmation of the order dated 22 March 1994 by the Federal Court would render the winding-up order and all proceedings under it totally discontinued, and that would have made it impossible for the order dated 29 June 1994 to have been made under the discontinued proceedings.

A **[Bahasa Malaysia summary**

Pada 5 September 1989, Nadchatiram Realities (1960) Sdn Bhd telah diperintahkan supaya digulung secara wajib oleh Mahkamah Tinggi atas suatu petisyen pemiutang oleh Jabatan Hasil Dalam Negeri. Pada 22 Mac 1994, Mahkamah Tinggi telah membenarkan
B suatu permohonan oleh empat orang penyumbang kepada syarikat itu (yang termasuk responden pertama dan kedua) untuk melepaskan perintah penggulungan itu dan menggantung semua prosiding berkaitan dengan penggulungan itu ('perintah 22 Mac itu'). Permohonan perayu ke Mahkamah Agung pada masa itu untuk
C suatu penggantungan interim perintah 22 Mac itu telah dibenarkan dan rayuan beliau ke Mahkamah Persekutuan masih menunggu penyelesaian. Sementara itu, pada 29 Jun 1994, hakim telah membenarkan suatu permohonan oleh responden pertama, kedua dan ketiga untuk mengetepikan suatu perintah terdahulu bertarikh
D 24 Januari 1994 yang telah diperolehi oleh perayu dan untuk relief lain. Perayu sekarang membuat rayuan kepada Mahkamah Rayuan terhadap perintah bertarikh 29 Jun 1994 itu. Isu di hadapan mahkamah ialah apakah kesan suatu penggantungan prosiding ke atas suatu perintah penggulungan.

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Diputuskan, membenarkan rayuan itu dan mengetepikan perintah bertarikh 29 Jun 1994 itu:

(1) Sesuatu perintah penggulungan tidak boleh dilepaskan atau dibatalkan selepas ia dibuat dan remedi tunggal ialah untuk
F memohon bagi suatu penggantungan prosiding di bawah s 342(1) Akta Syarikat 1965. Kesan suatu perintah untuk menggantung prosiding di bawah perintah penggulungan ialah suatu pemberhentian atau penamatan prosiding penggulungan itu sama sekali.

G (2) Walaupun perintah 22 Mac itu sendiri telah digantung oleh Mahkamah Agung pada masa itu, ia masih wujud walaupun ia tidak beroperasi buat sementara waktu sehingga rayuan itu didengar oleh Mahkamah Persekutuan. Oleh kerana perintah 22 Mac itu masih wujud, hakim itu tidak sepatutnya mendengar permohonan itu atau membuat sebarang perintah selepas tarikh
H itu di dalam prosiding di bawah perintah penggulungan itu. Suatu pengesahan perintah 22 Mac 1994 oleh Mahkamah Persekutuan akan menyebabkan perintah penggulungan dan semua prosiding di bawahnya diberhentikan sama sekali, dan itu akan menjadikannya mustahil bagi perintah bertarikh 29 Jun
I 1994 itu dibuat di bawah prosiding yang telah diberhentikan.]

Notes

For cases on stay of proceedings under a winding-up order, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 560–561.

Cases referred to

Re Baxters Ltd [1898] WN 60 (refd)
Shree Chamundi Mopeds Ltd v Church of South India Trust Association (1992) 3 SCC 1; AIR 1992 SC 1439 (refd)

Legislation referred to

Companies Act 1965 ss 243(1), 342(1)
Companies Act 1961 s 243(1) [Aust]
Companies Act 1981 s 383 [Aust]
Corporations Act 1989 s 482 [Aust]
Companies Act 1948 s 256(1) [UK]
Insolvency Act 1986 s 147(1) [UK]
Insolvency Rules 1986 r 7.47(1) [UK]

Appeal from: Winding Up Petition No 28–2–1988 (High Court, Seremban)

Cecil Abraham (*Satharuban Sivasubramaniam* with him) (*Satha & Co*) for the appellants.

N Saraswathy Devi (*RS Sodhi* with her) (*N Saraswathy Devi*) for the respondents.

Noorin Badaruddin (Federal Counsel) for the Official Receiver and liquidator.

Cur Adv Vult

NH Chan JCA (delivering the judgment of the court): On 5 September 1989, Nadchatiram Realities (1960) Sdn Bhd was ordered to be compulsorily wound up by the High Court in Seremban (companies winding-up petition No 28–2–1988) on a creditor's petition by the Inland Revenue Department. The official receiver was appointed liquidator.

On 22 March 1994, on an application by four contributories of the company (the first and second respondents together with Dr Mahadevan s/o Nadchatiram and Danapakia Devi d/o Nadchatiram) to 'discharge the winding-up order and/or stay all proceedings in relation to the winding up altogether', the High Court had ordered that the order to wind up the company dated 5 September 1989 and all proceedings under it be stayed altogether.

Section 243(1) of the Companies Act 1965 reads:

> At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

There are similar provisions in the United Kingdom, see s 256(1) of the Companies Act 1948 and s 147(1) of the Insolvency Act 1986 (see 10 *Atkin's Court Forms* (2nd Ed, 1992 Issue) at p 384 note 1, where it says:

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> Until the Insolvency Rules 1986 ... came into force a winding up order could not be rescinded after it had been drawn up. The only remedy was to apply for a stay: *Re Intermain Properties Ltd* [1986] BCLC 265. The Insolvency Rules 1986 r 7.47(1) provides that: 'every court having jurisdiction under the Act to wind up companies may review, or vary an order made by it in the exercise of that jurisdiction.

B There is no rule of practice or statutory provision in this country which is equivalent to the UK r 7.47(1) of the Insolvency Rules 1986). In Australia, see s 243(1) of the Companies Act 1961, s 383 of the Companies Act 1981 and s 482 of the Corporations Act 1989.

C The proper course is to stay proceedings under the winding-up order, and not to discharge it (*Re Baxters Ltd* [1898] WN 60): *Palmer's Company Precedents* (17th Ed) Pt II 'Winding up' at p 96. It is the practice not to rescind the winding-up order, but to stay proceedings under it (*Re Baxters*, 2 *Supreme Court Practice 1993* para 5220 at p 1618). See also 10 *Atkin's Court Forms* (2nd Ed, 1992 Issue) at p 46 and at p 386, Forms 111 D and 112 for the application and order.

Once a winding-up order has been made:

> Its descent into dissolution will be prevented only in the unusual event of the court ordering either an indefinite stay of the winding-up proceedings or termination of the winding up. The court has inherent jurisdiciton to grant E a stay: *Brinds Ltd v Offshore Oil NL (No 2)* (1985) 10 ACLR 232. Statutory jurisdiction to grant a stay or terminate is conferred by s 383 [of the Companies Act 1981/s 483 of the Corporations Act 1989]: Ford, *Principles of Company Law* (5th Ed, 1990) para 2207 at p 770.

A winding-up order could not be discharged or rescinded after it had been F made. The only remedy is to apply for a stay of proceedings under the winding-up order: see s 342(1) of the Companies Act 1965.

The effect of an order to stay proceedings under the winding-up order altogether after a winding-up order has been made is a total discontinuance or termination of the winding-up proceedings. In 2 *Jowitt's* G *Dictionary of English Law* (2nd Ed) under 'Stay' at pp 1701–1702, after stating that the term 'stay of proceedings' can mean a total discontinuance of an action, it says this:

> ... but in strictness it is only accurate when a decree or judgment has been given, for in such a case the suit or action cannot be dismissed, because the H court has adjudicated on it, and therefore all that can be done is to stay proceedings under the decree or judgment.

The appellant has appealed against the order of 22 March 1994 which has stayed all further proceedings under the winding-up order and which effectually has totally discontinued or terminated the winding-up I proceedings. That appeal is now pending in the Federal Court.

On 4 April 1994, the Supreme Court (as it was called then) granted an interim stay of the order of the High Court dated 22 March 1994 and on 3 May 1994, that court granted a further stay of the said order dated 22 March 1994 pending appeal to the Federal Court (as it is called now).

What then is the effect of the stay order of the then Supreme Court on the order of the High Court dated 22 March 1994? It has the effect of suspending or staying the operation of the High Court order of 22 March 1994.

The stay of operation of an order means that the order which has been stayed would not be operative from the date of the passing of the stay order. It does not mean that the said order has been wiped out from existence: see *Shree Chamundi Mopeds Ltd v Church of South India Trust Association* (1992) 3 SCC 1 at p 9; AIR 1992 SC 1439, and *Supreme Court on Words and Phrases* (1993) at p 659. Therefore the effect of the order of the then Supreme Court ordering a stay of the order of the High Court dated 22 March 1994 is that the order of the High Court of 22 March 1994 would not be operative from the date of the passing of the stay order of the then Supreme Court. It does not mean that the order of the High Court dated 22 March 1994 staying all further proceedings under the winding-up order dated 5 September 1989 has been wiped out from existence. The order of the High Court dated 22 March 1994 ordering an indefinite or permanent stay of the winding-up proceedings is still in existence although, for the time being, inoperative or suspended until the appeal is heard by the Federal Court when it can either be set aside or affirmed.

Despite the order of 22 March 1994 which still exists, the judge on 29 June 1994 entertained and heard an application by the first, second and third respondents to set aside an earlier order dated 24 January 1994 (and another order dated 7 January 1991 but that was withdrawn at the hearing) which had been obtained by the appellant in the winding-up court, and for other reliefs. The judge allowed the application. Against this order dated 29 June 1994, the appellant has appealed to this court.

It is because the order dated 22 March 1994 still exists that the judge ought not to have heard the application or to have made any order on it after that date in proceedings under the winding-up order.

For the reasons stated above, we have allowed the appeal and set aside the order dated 29 June 1994.

If it were otherwise, so that the order dated 29 June 1994 were allowed to remain undisturbed and the order dated 22 March 1994 was affirmed by the Federal Court on appeal, it would have made the decision of the Federal Court nugatory as well as nonsense of the order of the High Court dated 22 March 1994. This is because by affirming the order dated 22 March 1994, the winding-up order and all proceedings under it would have been totally discontinued, and that would have made it impossible for the order dated 29 June 1994 to have been made under the discontinued proceedings.

Appeal allowed.

Reported by Anne Khoo